VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA )
)
v. ) CRIMINAL NO. 102888
)
LEE BOYD MALVO )

RESPONSE TO MOTION FOR CHANGE OF VENUE

There is, in Virginia, "a presumption that a defendant will receive a fair trial in the jurisdiction where the crimes were committed. To overcome the presumption, a defendant must establish that the citizens of the jurisdiction harbor such prejudice against him that it is reasonably certain he cannot receive a fair trial." Kasi v. Commonwealth, 256 Va. 407, 420 (1998). Accord Lilly v. Commonwealth, 255 Va. 558, 570 (1998). Roach v. Commonwealth, 251 Va. 324, 342 (1996). It has been said time and again by the Supreme Court of Virginia that "the fact that there have been media reports about the accused and the crime does not necessarily require a change of venue." Buchanan v. Commonwealth, 238 Va. 389, 407 (1990). And see Roach v. Commonwealth, supra, at page 342, and Lilly v. Commonwealth, supra, at page 570. Furthermore, "it is not required, however, that the jurors be totally ignorant of the facts and issues involved." Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639 (1961).

The defense essentially makes two claims in its motion. The first is that all the citizens of Fairfax County are victims. Such a claim is factually preposterous. It raises the notion of "victimhood" to a totally new dimension, a dimension where one is a victim whether he or she knows it or not. It is a proposed dimension that is insulting to those who are actual victims. Secondly, there will be no evidence in this case of an intent to intimidate the populace; the intent was to intimidate the government into complying with monetary demands.

The second claim offered by the defense is that pre-trial publicity has "tainted the

jury pool." Saying it does not make it so, it is the defense burden to prove it. They must prove, under the case law in Virginia, that the citizens of Fairfax County "harbor such prejudice against him" that he cannot receive a fair trial. Kasi v. Commonwealth, 256 Va. at page 420. The aforesaid Kasi case, a capital case tried in this circuit, is a great case in point. That case had substantial publicity at the time of the rather sensational killings, much more four years later upon Kasi's capture, and throughout the pre-trial motions (including a motion to suppress a confession) in the four months prior to trial. In spite of rather dire predictions to the contrary and a motion for change of venue, it took only 58 citizens to find a 24 person panel who were, in the words of the great Lord Coke "indifferent" to the cause.

In any event, the motion here is at best premature. As was said by the Virginia Supreme Court in Thomas v. Commonwealth, 263 Va. 216 at page 230:

> "In considering evidence of community prejudice based on pretrial publicity, widespread knowledge of the case alone is insufficient to overcome the presumption. Jurors need not be ignorant of the crime. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), *Buchanan v. Commonwealth*, 238 Va. 389, 406, 384 S.E. 2d 757, 767 (1989). In addition to the volume of publicity, factors identified as relevant in determining the impact of pretrial publicity on the defendant's ability to obtain a fair trial are whether the publicity is accurate, temperate, and non-inflammatory, and the timing of the publicity. *Id.* at 407, 384 S.E.2d at 769; *Greenfield v. Commonwealth*, 214 Va. 710, 717, 204 S.E.2d 414, 419-20 (1974). Thus, publication of matters concerning the crime, the accused's prior criminal record, and even a confession of the accused, if factually accurate and non-inflammatory, is not improper and will not alone support a change of venue. *Id.* 204 S.E.2d at 420."

The Court in Thomas went on at page 232, to point out that:

> "Even in light of the volume and nature of the pretrial publicity in this case, the trial court was correct in proceeding to engage in voir dire. Such publicity was not so inaccurate, inflammatory or extensive that the trial would be deemed inherently lacking in due process. Accordingly, the trial court correctly took the matter under advisement until the voir dire process."

Accordingly, we ask the Court to deny the motion at this time, with of course, the right to raise it again should the difficulty of impaneling a jury render it reasonable to believe that a fair trial cannot be had in this county.

Respectfully submitted,

ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Motion for Change of Venue was mailed, postage prepaid to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151 and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221 this 21st day of May, 2003.

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Commonwealth's Attorney